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MICHAEL RODAK, J

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-631

HOWARD JOHNSON COMPANY, INC.
Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its Petition for Certiorari and in its Brief to this Court, Petitioner discussed two questions: whether Petitioner is a "successor employer" when it has selected a work force which does not contain a majority of employees who were employed by a prior employer; and whether Petitioner is required to arbitrate pursuant to the arbitration provisions of a collective bargaining contract between a prior employer and a union. Respondent's Brief, in discussing these questions, has placed almost sole reliance on the decision of this Court in *John Wiley & Sons* v *Livingston*. Petitioner submits that *Wiley* is not applicable to the questions presented in this proceeding and that Respondent's reading of *Wiley* would expand that decision far beyond the intention of this Court, would avoid the distinction of *Wiley* made by this Court in *NLRB* v *Burns International Security Services, Inc.*, and would make *Wiley* contrary to *Burns*.

ARGUMENT

THE DECISION OF THIS COURT IN *WILEY* DOES NOT SUPPORT THE DETERMINATION OF THE SIXTH CIRCUIT BELOW

In its decision below, the Sixth Circuit Court of Appeals concluded that resolution of this case is dependent upon proper construction of the decisions of this Court in *John Wiley & Sons* v *Livingston* [1] and *NLRB* v *Burns International Security Services, Inc.* [2] However, the court below misread *Wiley*, and incorrectly held that *Wiley* is applicable to the facts of this case. In so doing, the Sixth Circuit has reached a result wholly inconsistent with *Burns*, and its decision must therefore be reversed.

Similarly, Respondent has relied extensively upon *Wiley*. Respondent urges that *Wiley* be interpreted as standing for the proposition that Petitioner is a successor employer even though it hired only a miniscule number of Grissoms' employees which represented a minority of the work force with which Petitioner commenced business operations. Respondent also urges that *Wiley* requires that the process of arbitration be used to determine whether Petitioner has contractual obligations to Respondent.

Wiley is Clearly Distinguishable

Respondent's fundamental allegation is that the instant case "is identical to *Wiley*". [3] Respondent's error in this regard is clearly demonstrable. *Wiley* is a carefully circumscribed case, both by its facts and by the issues it seeks to resolve. Additionally, its holding is a very narrow one, [4] and so this Court has repeatedly

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[1] 376 U.S. 543 (1964).

[2] 406 U.S. 292 (1972).

[3] Respondent's Brief at 12, 41.

[4] "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here the successor employer may be required to arbitrate with the union under the agreement." 376 U.S. at 548.

recognized.[5]

Factually, *Wiley* is clearly distinguishable.[6] There, all of the employees of the prior employer became employees of the newly-merged corporation. Here, only a few employees of Grissoms (nine of thirty-three in one unit, zero of nine in the other) became Petitioner's employees. In *Wiley*, suit was filed to compel arbitration of grievances relating solely to the former Interscience employees assimilated by Wiley, arising subsequent to the merger, and related to the conditions of employment established by Wiley. Here, suit was filed before the purchase of assets to compel arbitration not of grievances pertaining to the former Grissoms employees hired by Petitioner but of the extent of application of the Grissoms' labor contract to the whole of Petitioner's work force. Additionally, in *Wiley* the original employer had disappeared by merger and no longer retained separate corporate existence for purposes of participation in arbitration. Here, the original employer was a party to this proceeding and has stipulated that it accepts arbitration of claims of the Union and grievances of its employees under its collective bargaining agreement.

The issues sought to be resolved through arbitration in *Wiley* differ greatly from those proposed by Respondent. At issue in *Wiley* was whether an employer could be required to submit to arbitration grievances of its own employees arising while those employees worked for that employer, even though it had not signed the collective bargaining agreement upon which the griev-

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[5] In *Burns* this Court said that *Wiley's*

> "... holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." 406 U.S. at 286.

In *Golden State*, this Court said that, in *Wiley*,

> "We held that the disappearance of the contracting corporation by merger did not necessarily terminate the rights of employees guaranteed by the agreement..." 94 S. Ct. at 424.

[6] It must be noted that, factual distinguishability aside, many observers are not willing to concede *Wiley* any remaining validity after *Burns*, and urge its immediate repudiation. See, e.g., Benetar, *Successorship Liability Under Labor Agreements*, 1973 Wis. L. Rev. 1026 (1974). See also, Amicus Brief of United States Chamber of Commerce, submitted in this cause.

ances were based. The issue here does not concern arbitration of grievances arising in the course of employment by Petitioner; rather, here the issue is whether Petitioner must arbitrate whether employees of another employer, represented by Respondent but not hired by Petitioner, should have contract rights, including employment status, enforceable against Petitioner. [7]

This Court held in *Burns* that a contract of a predecessor employer does not continue in effect as to a subsequent employer, although a union can retain its status as bargaining representative should the majority of the new employer's work force consist of employees of the predecessor. Contract survival, in whole or in part, was unanimously rejected by this Court in *Burns* as running counter to the national labor policies of freedom of contract, employee free choice in the selection of bargaining representatives, and reliance upon relative economic strengths to achieve industrial peace.

Respondent urges that this Court's mandate in *Burns* be ignored on the basis that *Burns* was decided on appeal from a Board proceeding while the instant case is on appeal from a court proceeding. Thus, Respondent seeks to develop a dichotomy in federal labor law, with choice of forum playing a critical role in ascertaining the rights and duties of employees and employers

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[7] Wiley clearly does not support such a theory, and Respondent's difficulty with the carefully limited holding of *Wiley* is exemplified by Respondent's statement that:

> "... if one reads *Wiley* correctly, and the Company's reading is not even arguable, the Union is plainly entitled to an order directing Howard Johnson to arbitrate the scope of its obligations to the Union and the employees it represents under the agreement between the Union and Grissoms. And, again contrary to Co. Br. 22, that is all that the judgment below does; it does not 'apply the former contract to the entire labor force'." Respondent's Brief at 17-18.

If Respondent means to suggest that now it wishes to arbitrate only the extent to which Petitioner has a duty to satisfy grievances arising under the prior labor contract and limited to the few Grissoms' employees hired by Petitioner, the entire complexion of this case is changed. The Sixth Circuit decision below contains no such qualification, nor has Respondent suggested such qualification until now. The peculiarity of Respondent's statement is further emphasized if one considers that Petitioner hired no Grissoms employees to work in the motel. Does the Respondent now suggest that the motel contract did not survive since Respondent hired no Grissoms employees?

alike. The Sixth Circuit below, in full recognition of the created problems of dichotomy and forum-shopping, has held *Burns* inapplicable to the present proceeding. In so holding, the Sixth Circuit has misconstrued both national labor policy and the proper role of arbitration in a collective bargaining contract.[8]

The Effect of *Lion Dry Goods*

Respondent fails to distinguish between contract enforcement and contract survival, as illustrated by its citation of *Retail Clerks* v *Lion Dry Goods*.[9]

Lion Dry Goods was a suit under §185 by a union to enforce the grievance provision of a strike settlement agreement executed by the union and an employer with whom the union had previously had a collective bargaining relationship. During contract renewal negotiations bargaining broke down, and a strike ensued which lasted longer than a year. Through the efforts of a mediation body the strike was ultimately resolved and the settlement agreement signed. In the agreement the union agreed that it was not the exclusive bargaining agent of the employees. Subsequent to the execution of the agreement grievances arose and were submitted to arbitration, but the employer failed to comply with the arbitral awards, and the union instituted suit for enforcement. This Court held that such a suit could be maintained, even though the union was not the exclusive bargaining representative, it being uncontradicted that a present agreement was validly in effect between the two contracting parties, and that the purpose and design of the agreement was to achieve labor peace. Consequently, this Court in *Lion Dry Goods* was concerned solely with the

[8] The Sixth Circuit held that despite *Burns*, an arbitrator can hold that provisions of the contract of the predecessor continue in effect on a selective, not an all-or-nothing basis. The Court ignored the contract arbitration provision which states that the arbitrator shall have no ". . .authority to add to, subtract from or modify the terms and provisions of this Agreement. Further, the renewal, extension, modification or amendment of this Agreement shall not be the subject matter of any grievance or arbitration procedure." A. 90a.

[9] 369 U.S. 17 (1962).

enforcement of a valid labor contract.[10] This Court expressly did not decide

> . . . whether minority unions may demand that employers enter into particular kinds of contracts . . .[11]

This is precisely the critical distinction which Respondent has missed. The case at bar concerns not the enforcement of a valid labor contract executed between the two parties here present, but the survival so far as Petitioner is concerned of a labor contract executed between Respondent and another employer. If Petitioner had made some kind of settlement agreement with Respondent, *Lion Dry Goods* says it could be enforced even though Respondent does not represent a majority of Petitioner's employees. However, *Burns* says the agreement between Respondent and Grissoms did not survive the transfer of the business operation from Grissoms to Petitioner.

Arbitration is a Process of Dispute Resolution Established Under Collective Bargaining Contracts Voluntarily Executed

The expansive interpretation of *Wiley* adopted by the court below and argued by Respondent misconstrues the role of arbitration in the scheme of our federal labor policy. Arbitration is part and parcel of the collective bargaining process. When dispute develops between consenting parties to an agreement as to the interpretation of that agreement, arbitration is a procedure used as a terminal point for resolving that dispute rather than resort to the economic weapons of lockout and strike. The arbitrator, constrained by the confines of the contract, interprets and construes the agreement, and his decision as to contract meaning is not sub-

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[10] That such is the case is clearly underscored by this Court's citation of *Lion Dry Goods* in *Wiley* for the following proposition:

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. *Retail Clerks* v *Lion Dry Goods*." 376 U.S. at 551.

[11] 369 U.S. at 28.

ject to review. Yet, under the proposed interpretation of *Wiley*, the arbitrator's role is expanded so that he is given authority to determine both whether the contract initially applies to the employer and the extent to which it applies.

This contention is contrary to the declarations of this Court in its recent decision in *Gateway Coal Co.* v *United Mine Workers*, [12] wherein this Court stated:

> No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so. 42 U.S.L.W. at 4097.
>
> * * *
>
> The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command. Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d), states in part:
>
> > Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. 42 U.S.L.W. at 4098.

Additionally, this Court, in *Alexander* v *Gardner-Denver*, [13] further emphasized the role of arbitration when it quoted with approval the following statement of Dean Shulman:

> A proper conception of the aribtrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of industrial self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. Shulman,

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[12] 42 U.S.L.W. 4095 (U.S. Jan. 8, 1974).

[13] 42 U.S.L.W. 4214 (U.S. Feb. 19, 1974).

> Reason, Contracts and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016 (1955). 42 U.S.L.W. at 4219.[14]

Respondent invites this Court's attention to *Alexander* v *Gardner-Denver*, but for a different purpose. Respondent seeks to show that the inherent conflict between the Sixth Circuit's decision and *Burns* is reconciliable because "disputed transactions may implicate both contractual and statutory rights". That *Gardner-Denver* dealt with election of rights rather than election of forums is not addressed by Respondent. The issue here is not one of vindication of a variety of rights, but the legality of imposing on Petitioner a contractual obligation to which Petitioner at no time consented and which the great majority of Petitioner's employees have at no time requested or accepted. Certainly, an employee discharged because of union activities may have a remedy before the National Labor Relations Board even though he has no remedy for breach of a collective bargaining agreement. Likewise, an employee discharged for reasons other than union activities may have a claim for breach of a collective bargaining agreement even though he has no remedy before the Board. In some cases the same act may constitute both a breach of a collective bargaining agreement and a violation of the National Labor Relations Act.[15] However, the fact that an employee may have different rights under a contract, as was the case in *Gardner-Denver*, and therefore may have different remedies in different forums, does not mean that whether or not a contract survives should be decided differently by different forums.

Under the guise of *Wiley*, Respondent seeks to impose a labor agreement on a nonconsenting party. This will not foster industrial stability. As this Court said in *Burns*:

> Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties. 406 U.S. at 288.

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[14] See also, Regulations, Federal Mediation and Conciliation Service, 29 C.F.R. §1404.1: "The labor policy of the United States Government is designed to foster and promote free collective bargaining. Voluntary arbitration is encouraged by public policy . . . "

[15] See, e.g., *Smith* v *Evening News Association*, 371 U.S. 195 (1962).

Moreover, as clearly recognized in *Burns*, "holding either the union or the new employer bound to the substantive terms of an old collective bargaining contract may result in serious inequities".

Such inequities result whether the labor agreement is applied to the unconsenting employer or union either selectively or in whole, whether by an arbitrator or by the Board.

It must be noted that, under Respondent's argument, arbitration can lead to the acquisition of bargaining rights against Petitioner – a result which flies in the face of *Burns*. If, through arbitration, Respondent can force Petitioner to recognize seniority rights of Grissoms' employees, Petitioner would have to replace the employees it has hired with those of Grissoms. Once a majority of Petitioner's labor force consisted of Grissoms' employees, Respondent would attain the status of the bargaining representative of all the employees. Thus, through arbitration, Respondent would be able to acquire bargaining rights it does not now possess. This further illustrates the fallacy of Respondent's argument for differentiating between § 158 and § 185 in terms of the labor policies from which they draw substance and meaning. One section cannot be used to circumvent another.

At the heart of this controversy is whether Howard Johnson can employ its own labor force, set its own terms and conditions of employment, and structure its operations free from the constraints of collective bargaining agreements which it neither negotiated nor adopted. Respondent seeks through arbitration to circumscribe Petitioner in exactly the same way as the prior employer, Grissoms. Yet, it is this very result which this Court rejected in *Burns:*

> The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective-bargaining contract. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted.

> Given the continuity of the employment relationship, the preexisting contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor. 406 U.S. at 288-89.

Reversal of the Sixth Circuit below will not, as Respondent claims, run counter to the oft-expressed presumption of arbitrability or undermine the viability of arbitration, for the Sixth Circuit announces a principle of compulsory, rather than voluntary, arbitration. Arbitration achieved its significant role in the free collective bargaining process prior to *Wiley*, and it will continue to prove useful and beneficial without need of expanding the role of arbitration so as to permit the imposition of labor agreements on unconsenting parties. Seen in the context of the national labor goals and the clearly identified policies enunciated in this Court's *Burns* decision, the arbitral forum is appropriate and intended as an expeditious means within the free collective bargaining process to resolve disputes as to contract interpretation between parties who have consented to the contract. Conversely, the arbitral process is inappropriate and totally inconsistent with national labor policies if used as a means for imposing contract terms, either in whole or in part, upon a nonconsenting party.

Viewed in historical perspective, this Court has consistently recognized and emphasized that the Congressional mandate is voluntarism in the collective bargaining relationship:

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever .... The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. *NLRB* v *Jones & Laughlin Steel Corp.*, 301 U.S. at 45.

This policy has subsequently been codified in § 158(d) of the Act.

In *H. K. Porter Company, Inc.* v *NLRB*, 397 U.S. 99 (1970), this Court recently reaffirmed this fundamental national labor policy:

> One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. 397 U.S. at 108.

In their dissenting opinion in *H. K. Porter*, Justices Douglas and Stewart, in agreement with the majority's statement of the underlying purposes of the Act, stated:

> The Court correctly describes the general design and main thrust of the Act. It does not encompass compulsory arbitration; the Board does not sit to impose what it deems to be the best conditions for the collective-bargaining agreement; the obligation to bargain collectively 'does not compel either party to agree to a proposal or require the making of a concession.' 397 U.S. at 110.

In *Burns*, this Court again re-emphasized that voluntarism is the basis of the national labor policies:

> Nothing in its actions, however, indicated that Burns was assuming the obligations of the contract, and 'allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract'. 406 U.S. at 287.

Despite these consistent pronouncements spanning some thirty years of the development of federal labor law, Respondent urges a wholly contrary position. In so doing, Respondent seeks to expand *Wiley* so as to swallow up the very foundation of federal labor laws.

CONCLUSION

As has been shown, the decision of the Sixth Circuit below goes far beyond the limited holding of *Wiley*. The decision, if allowed to stand, would effect a dramatic shift away from the steady progression of federal labor law favoring uniformity, voluntarism, and employee free choice. The decision of the Sixth Circuit below should be reversed.

Respectfully submitted,

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